

RACIAL EQUALITY AND THE LAW: CREATING AN EFFECTIVE STATUTE AND ENFORCEMENT MODEL FOR HONG KONG

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The Hong Kong government has commenced a public consultation exercise on a bill to prohibit racial discrimination, which is expected to be introduced in the Legislative Council in early 2005. The government has proposed to model the bill on the existing Sex Discrimination Ordinance (SDO) and the Disability Discrimination Ordinance (DDO). While there are advantages to adopting a familiar format, the author argues that the SDO and DDO can be improved upon, in particular, that a more flexible definition of indirect discrimination should be adopted and that special provisions be drafted to address discrimination against new immigrants from mainland China. The author takes the view that this is an opportune time to strengthen the enforcement model for all of Hong Kong's anti-discrimination laws. The author proposes that officers at the Equal Opportunities Commission (EOC) be empowered to take a more proactive approach and that a specialist equal opportunities tribunal should be established outside the auspices of the EOC.

Introduction

In September 2004 the Hong Kong government released *Legislating Against Racial Discrimination: a Consultation Paper*.¹ Unlike prior consultation exercises, which asked whether legislation was necessary, the *Consultation Paper* assumes that a bill will be drafted in 2005 and seeks views on the proposed approach. Once enacted, it will be the first Hong Kong law to prohibit racial discrimination, harassment, and vilification in the private sector. It will apply to a wide range of fields, including employment, education, housing, the administration of government programmes, and the provision of goods

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¹ Home Affairs Bureau, Government of the Hong Kong Special Administrative Region, *Legislating Against Racial Discrimination: A Consultation Paper*, Sept 2004 (hereinafter "*Consultation Paper*").

and services. The first part of this article considers the background and aims of the legislation. Then the substantive proposals in the *Consultation Paper* are considered. The government plans to model the bill on the existing Sex Discrimination Ordinance (SDO) and Disability Discrimination Ordinance (DDO).² While there are advantages to adopting a familiar structure, improvements can be made. For example, special provisions should be drafted to address discrimination against new immigrants from mainland China and a more flexible definition of indirect discrimination should be adopted. The exemptions could also be drafted in narrower and more precise language. In the final section, it is argued that this is an opportune time to strengthen the enforcement model for all of Hong Kong's anti-discrimination laws, as recent research demonstrates that the current emphasis upon confidential conciliation of complaints leaves too much power in the hands of respondents and limits the social impact of the laws.

Background and Aims of the Legislation

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)³ has bound the Hong Kong government for 35 years.⁴ Article 2 obligates each State Party to "prohibit and bring to an end, by all appropriate measures, including legislation as required by circumstances, racial discrimination by any persons, group, or organisation." Since international treaties are not directly enforceable in Hong Kong courts, this obligation can only be fulfilled by enacting domestic legislation. The British government enacted limited legislation prohibiting race discrimination in 1965 and 1968 and then significantly expanded its legislative framework with the Racial Relations Act 1976. Although the Hong Kong government often copied British law reform in the colonial era, it declined to do so in this field, arguing that anti-discrimination laws would burden employers and contradict Hong Kong's laissez-faire economic policies. The local government also claimed that the "circumstances" of Hong Kong did not require legislation

² Sex Discrimination Ordinance (Cap 480), Laws of Hong Kong and Disability Discrimination Ordinance (Cap 487), Laws of Hong Kong, both of which were enacted in 1995 and came into force in 1996. The two ordinances are also published on the website of the Hong Kong Equal Opportunities Commission at <http://www.eoc.org.hk>.

³ ICERD was adopted and opened for signature and ratification by General Assembly resolution 2106A of 21 Dec 1965 and came into force on 4 Jan 1969.

⁴ The British government ratified the treaty in 1969 and applied it to its dependent territories, including Hong Kong. The Chinese government, which ratified ICERD in 1981, notified the United Nations Secretary-General, by letter dated 10 Jun 1997, that ICERD would continue to apply to Hong Kong after the handover. See *Consultation Paper* (n 1 above), Annex A, p 41.

because discrimination was not a significant problem here. This was an indefensible position, given Hong Kong's colonial history and the documented examples of discrimination in both the public and private sectors.⁵

It was not until 1991, when the Bill of Rights Ordinance⁶ was enacted, that the people of Hong Kong obtained a legal right to equality in the public sector. Based upon the International Covenant on Civil and Political Rights (ICCPR), the Bill of Rights prohibits discrimination on numerous grounds, including race, sex, and religious affiliation. However, it has had limited impact, in part because it binds only the government and public authorities but also because the Equal Opportunities Commission (EOC) has never been given jurisdiction to enforce the equality provisions of the Bill of Rights. As a result, litigation under the equality provisions of the Bill of Rights has been rare.⁷ Without the assistance of a body like the EOC, victims of discrimination will often lack the knowledge and the resources to challenge discriminatory policies. For example, the government's system of allocating students to secondary schools, which was declared unlawful in 2001, almost certainly became unlawful in 1991 when the Bill of Rights came into force. However, since it was never challenged under the Bill of Rights, the policy was applied for another decade – to the detriment of many students.⁸

In 1994, former legislator Anna Wu made the first attempt to prohibit discrimination in the private sector, by introducing the Equal Opportunities Bill (EOB), which would have prohibited discrimination on several different grounds, including race, sex, disability, age, and sexuality. The government successfully opposed the EOB, but only by agreeing to introduce two narrower pieces of legislation, the SDO and the DDO. At the time, the government argued that Hong Kong needed to move “step by step” into the

⁵ For a discussion of racially discriminatory laws and government policies during the colonial era, see Richard Klein, “Law and Racism in an Asian Setting: An Analysis of the British Rule of Hong Kong” (1995) 18 *Hastings International & Comparative Law Review* 223. For examples of discrimination during the transitional period and since 1997, see Carole J. Petersen, “Equality as a Human Right: the Development of Anti-Discrimination Law in Hong Kong” (1996) 34 *Columbia Journal of Transnational Law* 335; Carole J. Petersen, “Equal Opportunities: A New Field of Law for Hong Kong”, in Raymond Wacks (ed) *Hong Kong's New Legal Order* (Hong Kong: HKU Press, 1999); and Kelley Loper, *Race and Equality: A Study of Ethnic Minorities in Hong Kong's Education System*, Centre for Comparative and Public Law Occasional Paper No. 12, Feb 2004 (available at <http://www.hku.hk/ccpl/>).

⁶ See Hong Kong Bill of Rights Ordinance (Cap 383), Laws of Hong Kong, especially s 8, Arts 1 and 22 (hereinafter the “Bill of Rights”).

⁷ For one of the few Bill of Rights cases on alleged race discrimination, see *R v Secretary for Civil Service and the Attorney General, ex parte Association of Civil Servants* (1995) 5 HKPLR 490, in which the Association of Expatriate Civil Servants sought judicial review of the government's localisation policy during the transition to 1997. The application was only partly successful as the court held that most elements of the policy were justified under the circumstances.

⁸ The allocation system was finally changed after the EOC conducted a formal investigation under the SDO and successfully sought judicial review in *EOC v Director of Education* [2001] 2 HKLRD 690. For further discussion of the case, see Carole J. Petersen, “The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong” (2002) 32 HKLJ 104.

field because anti-discrimination legislation was so new to the territory. Over the years, the government continued to oppose efforts to expand Hong Kong's legal framework for equality. Bills to prohibit race discrimination were drafted by Elizabeth Wong before the handover and by Christine Loh after the handover, but the government refused to support them. Bills to prohibit age and sexuality discrimination were also opposed by the government and defeated. As a result, the only new addition has been the Family Status Discrimination Ordinance (FSDO), which was relatively non-controversial and enacted in 1997.⁹

Three developments have gradually persuaded the government to soften its position on a law to prohibit racial discrimination. First, non-governmental organisations (NGOs) have become increasingly active and skilled in lobbying for legislation. One of these groups, Hong Kong Against Racial Discrimination, has been particularly successful in encouraging victims of discrimination to come forward and tell their stories. In the mid-1990s (when the EOB, SDO and DDO were being studied in the Legislative Council), ethnic minorities who suffered discrimination rarely complained. This was probably because they were concerned about their right of abode in Hong Kong after 1997 and had no desire to make trouble during the transition period. Seven years after the handover, however, the position of these groups is more settled and at least some members of ethnic minorities feel confident enough to come forward. The stories that they have told are shocking for a city that likes to think of itself as modern and cosmopolitan: an employer who pays Nepalese employees lower salaries or benefits than Chinese employees; landlords who refuse to rent apartments to South Asians; schools that try to hire only Caucasians to teach English; nightclubs that openly charge different entrance fees depending upon the customer's race; a security guard who routinely tries to prevent Indonesian guests from visiting a resident in the building.¹⁰ To the government's credit, it has included these and other examples in the *Consultation Paper*, acknowledging that they constitute violations of basic rights and must be addressed. Stories like these have also been publicised in the press and seem to have increased public support for legislation.¹¹ The government's Home Affairs Bureau also published voluntary guidelines on avoiding race discrimination in employment¹² and established a Race Relations Unit, which has received and recorded

⁹ Family Status Discrimination Ordinance (Cap 527), Laws of Hong Kong, also published on the website of the Hong Kong Equal Opportunities Commission at <http://www.eoc.org.hk>.

¹⁰ See *Consultation Paper* (n 1 above), Annex B, pp 42–44.

¹¹ *Ibid.*, paras 13–16, pp 4–5, and Annex C (noting evidence of increased public support).

¹² See Home Affairs Bureau, "Equal Opportunities: Code of Practice on Discrimination in Employment on the Ground of Race" (Hong Kong Government, Apr 1998).

complaints of race discrimination. By gathering data on the number and nature of complaints, the Race Relations Unit has documented the need for legislation. While noting that some complaints were found to be the result of "misunderstandings", the government acknowledges that others have proven to be "quite well-founded" examples of racial discrimination in the private sector.¹³ The Race Relations Unit can attempt to conciliate these complaints but can take no further action if the discriminator does not want to change, since the Unit has no law to back it up and no enforcement powers.

The second development that has affected the government's position is that Hong Kong's equality movement now enjoys greater support from the business community, particularly from foreign chambers of commerce.¹⁴ Once again, the stories of victims have played a role. The business community appears to have been moved in part by the revelation that even wealthy professionals are not immune to discrimination. South Asians who are prepared to rent luxury flats often find that landlords reject their applications when they discover the ethnicity of the prospective tenant. One Indian businessman described how he finally posed as an Italian in order to secure a lease.¹⁵ An Indian woman was rejected by landlords so many times that her Caucasian rental agent proposed a scheme: when they looked at flats the Indian woman posed as the agent while the Caucasian woman pretended to be the prospective tenant. Hearing these stories, international companies and chambers of commerce realised that the current situation is bad for business. If Hong Kong develops a reputation for tolerating such blatant examples of discrimination then some tourists and international conventions may not come here. International staff also may resist living here and multinational companies may decide to locate elsewhere in the region. While the local business community has been somewhat less supportive (probably because it has less experience complying with anti-discrimination laws than multinational companies), its opposition to legislation also appears to have softened.¹⁶ This is an important development because the government traditionally cited the business community's views as a primary reason for not enacting a law.

The third factor leading to this public consultation is that the Hong Kong government has an interest in boosting its reputation with the international committees that monitor compliance with human rights treaties. Hong Kong

¹³ See *Consultation Paper* (n 1) above, para 16, pp 5–6.

¹⁴ *Ibid.*, para 20, p 7. See also Ravina Shamdasani and Quinton Chan, "Strong Backing for Race Bias Law", *South China Morning Post*, 5 Nov 2001.

¹⁵ See *Consultation Paper* (n 1 above), Annex B, p 43.

¹⁶ *Ibid.*, para 12, p 4.

has frequently been criticised by the United Nations Committee on the Elimination of Racial Discrimination (known as the CERD Committee) for failing to implement ICERD by enacting a specific law prohibiting racial discrimination. The CERD Committee has not been impressed by the government's response, which was to insist that Hong Kong's "circumstances" did not require a law that applied to the private sector. Other international monitoring bodies, such as the Human Rights Committee and the Committee on Economic Social and Cultural Rights, have also been critical of the government's position. The government has cited these comments, in the *Consultation Paper*, as one of the reasons for proposing legislation.¹⁷ The Hong Kong government is anxious to show the world that human rights are protected here after the handover. Thus, while the government rejects many of the recommendations made by these international monitoring committees, it likes to show that it has made at least some improvements in time for the next periodic report. This has been particularly true in the last few years because the Hong Kong government has suffered a good deal of negative publicity, due to the Article 23 saga, the disagreements over the slow pace of democratic reform, and the cuts to social welfare. The government has also been accused of interfering with the independence of the EOC and this will almost certainly be raised by more than one international monitoring body.¹⁸ Introducing a bill to prohibit race discrimination is one way that the government can ensure that it receives at least some positive comments from the CERD Committee, the Human Rights Committee, and the Committee on Economic Social and Cultural Rights at the next public hearings on its reports under the relevant treaties.

When enacting the new law, the government and the legislature should consider this background and also the aims of the legislation. The law should be drafted sufficiently broadly so as to address the examples of discrimination that have been identified in Hong Kong. The experiences of the victims, which have played such an important role in the decision to legislate, should be addressed. The new law should also comply fully with ICERD, since this is one of the goals of legislating. With these purposes in mind, this article now turns to the substantive proposals in the government's *Consultation Paper*.

¹⁷ *Ibid.*, para 16, p 6.

¹⁸ For a discussion of the government's decision not to renew the contract of the former Chairperson of the EOC, Ms Anna Wu, after the EOC successfully litigated two cases against the government and the resulting concerns over the independence of the EOC, see Carole J. Petersen, "The Paris Principles and Human Rights Institutions: Is Hong Kong Slipping Further Away from the Mark?" (2003) 33 HKLJ 513.

The Substantive Provisions of the Racial Discrimination Bill

The government's basic plan is to follow the format of the existing anti-discrimination ordinances, the SDO, DDO, and FSDO. While there is some value in adopting a familiar structure, we should not be wedded to these ordinances. The legislative choices that were made in 1995 may not be the best choices 10 years on. UK law, which the government used as its primary model for the SDO in 1995, has been significantly updated and improved. In the area of race discrimination, the UK has since enacted the Race Relations Act 2000 (which places a duty upon all public services to actively promote racial equality) and the Race Relations Act 1976 (Amendment) Regulations 2003.¹⁹ Thus, if the government now simply copies the SDO framework, it will be using "old" UK law as its model. Moreover, racial discrimination in Hong Kong poses its own special problems and the legislation should be tailored, where appropriate, to address them.

The Grounds of Discrimination: National Origin and Immigrants from Mainland China

The government has proposed that the bill should prohibit discrimination on the grounds of "race, colour, descent, or national or ethnic origin." These grounds track the language of Article 1 of ICERD, which defines "racial discrimination" to mean "any distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin." However, it would not be wise to simply copy these grounds into the new law, without first considering the special circumstances of Hong Kong. As the CERD Committee has often observed, every jurisdiction should closely examine its own circumstances and develop legislation and policies to address the problems that exist there.

For Hong Kong, one of the most controversial issues is how to address discrimination suffered by new immigrants from mainland China. The Hong Kong government acknowledges that this discrimination occurs and has even included information on mainland immigrants when it reported to the CERD Committee, noting that they constituted a "distinct group" within the ethnic majority.²⁰ Now that it is time to legislate, however, the government has taken the position that this discrimination is not within the intended scope of a racial discrimination bill. The government has pointed out that most of

¹⁹ See Race Relations Act 1976 (Amendment) Regulations 2003, which came into force on 19 Jun 2003.

²⁰ See *Report of the Hong Kong SAR Under Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination* (submitted in 2000), especially paras 39–51, pp 58–64.

the new immigrants from mainland China are Han Chinese and therefore “of the same ethnic stock” as local Hong Kong Chinese.²¹ This is a somewhat confusing statement and may have inadvertently created the impression that the government thinks that racial discrimination is only possible between members of different racial groups. Of course, that is not the case and this author is confident that the government did not intend to imply this. Assume, for example, that a Chinese headmaster refuses to hire a Chinese person to teach English because the headmaster thinks that only Caucasian English teachers look “authentic” to students and their parents. That would be an example of a Chinese person discriminating on the grounds of race against another Chinese person and would certainly be prohibited under the government’s proposed bill. Moreover, a Chinese person who has recently immigrated to Hong Kong from the Mainland would be protected from that type of discrimination in the same way that a Chinese person born in Hong Kong would be protected.

The issue, therefore, is not whether new immigrants from China are covered by the bill. They will be covered and if they suffer discrimination on one of the grounds covered in the bill they will be entitled to a remedy just like everyone else. The issue is what “grounds” of discrimination should be included in the bill and whether the discrimination that new arrivals from the Mainland most commonly suffer will fit within one of those grounds. The government’s position is that it will not fit because the discrimination that Mainland immigrants commonly suffer is a form of “social discrimination” rather than a form of racial discrimination. However that is not entirely clear. As noted above, the government has acknowledged that the bill should prohibit discrimination on the ground of “national origin”. The term “national origin” generally refers to the country from which a person (or her ancestors) immigrated or travelled. Countries that attract immigrants from many different parts of the world, such as Canada, can have residents and citizens with many different “national origins”. Thus a person may have Canadian nationality and Chinese national origin. One of the purposes of including “national origin” in a racial discrimination law is to ensure that immigrant communities have equal opportunities in employment, education, housing, and other fields.

Of course, in a jurisdiction like Canada, where there are no restrictions on movement within the country, the immigrants who need this protection all come from a country outside Canada. Thus, the term “national origin” is sufficient to protect them. In contrast, since there is a border between Hong Kong and mainland China, the vast majority of immigrants to Hong Kong

²¹ See *Consultation Paper* (n 1 above), para 24, p 8.

come from within the same country. This means that we have to consider how the concept of “national origin” in ICERD should be interpreted and applied in Hong Kong’s racial discrimination law. This author suggests that the term should be expressly defined in the statute so as to include “origin from any territory outside the Hong Kong Special Administrative Region”. In this way, a new immigrant from mainland China would enjoy the same protection from discrimination that a new immigrant from Nepal or some other country would enjoy. Alternatively, the bill could expressly prohibit discrimination on the ground that a person is an immigrant, an approach that has been adopted in some jurisdictions.

Ethnic Origin and Discrimination on the Ground of Religious Affiliation

Another term that could be usefully defined in the bill is “ethnic origin”, which is inherently vague. The courts in the UK devised a test, albeit a fairly inexact one, for determining whether a group can be considered an “ethnic group”. In essence, the group must be shown to have “a long shared history” and cultural traditions of its own. The group must regard itself, and be regarded by others, as a distinct community and have at least some of the following characteristics: a common geographical origin; descent from a small number of common ancestors; a common language (which may or may not be peculiar to that group); a common literature; a common religion which differs from that of the general community; or the status of being a minority or an oppressed group. This test was developed in *Mandla v Dowell Lee*,²² a case in which Sikhs were held to constitute an ethnic group within the Racial Relations Act 1976. Similarly, in *CRE v Dutton*, the Court of Appeal held that the Irish travelling community (also known as gypsies) constitutes an ethnic group.²³ The outcome of the test depends to some extent on how well the plaintiff can articulate the “group identity” and the characteristics that distinguish it from the general community. The test can also lead to results that may seem inconsistent to the general public. For example, although Jews have been held to be an ethnic group under the Racial Relations Act 1976, religious groups perceived to have a wider and more culturally diverse membership would not pass the *Mandla* test. Therefore, the government may wish to increase certainty by defining the term “ethnic origin” in the bill. It could also consider including a non-exclusive list of groups that are considered to be distinct “ethnic groups” for the purposes of the law. This list should take into account the complaints of discrimination that have been made in Hong Kong so that groups that have been shown to require protection are covered.

²² *Mandla v Dowell Lee* [1983] 2 AC 548.

²³ *CRE v Dutton* [1989] IRLR 8.

Although it may be tempting to wait for the courts to develop terms like “national origin” and “ethnic origin”, litigation under Hong Kong’s existing anti-discrimination laws has been rare. This is because the vast majority of cases are resolved through the EOC’s complaints resolution processes (an issue which is discussed further below). Thus, if the bill does not define these terms it may be a very long time before the courts have an opportunity to develop and apply tests that are appropriate for the circumstances of Hong Kong. In the meantime, those who are trying to comply with and enforce the law would be forced to speculate on its scope.

Another way to provide greater certainty in the legislation would be to expressly include “religious affiliation or belief” as a prohibited ground of discrimination, in which case the title of the bill may need to be amended. This would eliminate the need for a religious group to argue that it is also an “ethnic group” in order to secure protection from discrimination. The Bill of Rights already prohibits the government and public authorities from discriminating on the ground of religious affiliation so this is not an unknown concept in Hong Kong law. It is also increasingly common for jurisdictions to prohibit discrimination on the ground of religion in the private sector. There is, in fact, no logical reason why discrimination on the ground of religion should not also be prohibited in a diverse community like Hong Kong.

Discrimination on the Grounds of the Racial or Ethnic Background of an Associate

The government has proposed to prohibit discrimination on the grounds of the race or ethnicity of the spouse or relative of a person. Thus, if a landlord refuses to rent to a prospective tenant because his wife is South Asian, the prospective tenant could bring an action for discrimination in his own name. This is a good suggestion, but this author would propose to expand it by prohibiting discrimination (as well as harassment and vilification) on the grounds of the race, ethnicity, colour, descent, or national origin of an *associate* of a person. The advantages of this approach can be seen from the following example: suppose that a student at the University of Hong Kong wishes to rent an apartment and the landlord refuses to rent it to her because her roommate is Nepalese. Since her roommate is not her spouse or relative the student would not be able to file a complaint of racial discrimination under the government’s proposed language. However, if the language is expanded to include “associates” as well as spouses and relatives, the student could file a complaint in her own name. Similarly, if a group of friends is denied admission to a bar (or charged a higher admission fee) on the ground of the ethnicity of one member, then all members of that group should be able to file complaints.

There is precedent for this approach as the Hong Kong DDO prohibits discrimination on the ground of the disability of an associate and this provision has proven valuable in redressing actual cases of discrimination.²⁴ There is no reason why we should not provide similar protection in the racial discrimination law.

The Definition of Discrimination

Hong Kong's existing anti-discrimination laws employ the traditional two-part definition of direct and indirect discrimination. The government has proposed to take the same approach in the racial discrimination bill. Direct discrimination would be defined as treating a person "less favourably" on one of the prohibited grounds. The courts normally apply the "but for" test to determine whether direct discrimination has occurred and this is unlikely to be controversial. The legislature should make sure, however, that the racial discrimination bill includes an equivalent of s 4 of the SDO, which makes it easier to prove discrimination in cases where more than one factor may have influenced the defendant's actions towards the plaintiff.²⁵

The definition of indirect discrimination proposed by the government is more problematic. Indirect discrimination is supposed to address practices and policies that appear to be neutral but have a disproportionate and detrimental impact when applied to certain groups. In the ICERD treaty, this is covered by the fairly simple "purpose or effect" language in Article 1. However, the definition used in the SDO and the DDO is more complex and has been criticised as too narrow. If this same definition is used in the racial discrimination bill then a plaintiff seeking to prove indirect discrimination would be required to identify a "requirement or condition" imposed by the defendant that the plaintiff cannot comply with and also to show that the proportion of persons in the plaintiff's racial or ethnic group that can comply with it is considerably smaller than the general population. This evidence would raise a "prima facie" case of indirect discrimination and the burden of proof would then shift to the defendant to show that the requirement or condition is justified under the circumstances. An example of indirect discrimination (under the government's proposed definition) would be a requirement by a secondary school that all of its English teachers must have graduated from a university in England. Even if this requirement were applied to all applicants, it is clear

²⁴ See *K, Y, and W v Secretary for Justice* [2000] 3 HKLRD 777, in which the District Court held unlawful a government policy of rejecting an applicant for jobs in the disciplined services if the applicant had a close relative who suffered from mental illness. The Court found that this policy constituted unlawful discrimination on the ground of the disability of the applicant's associate.

²⁵ For an example of the application of s 4 of the SDO, see *Chang Ying Kwan v Wyeth (HK) Ltd* [2001] 2 HKC 129.

that it would work to the detriment of certain ethnic and racial groups. It is also clear that the secondary school would not be able to justify the requirement as necessary for that job.

The problem with the government's proposed definition of indirect discrimination is that it is likely to be interpreted rather narrowly by the courts. Prior to 2003, the "requirement or condition" language was also used in the definition of indirect discrimination in the Race Relations Act 1976 and courts in the United Kingdom tended to interpret this as requiring the plaintiff to identify some policy that acted as an "absolute bar" to her hiring, promotion, or other benefit.²⁶ As hiring decisions are normally based upon a balance of many different criteria, this can be very difficult to establish. While the interpretation given to the phrase by the UK courts can be criticized, it is entirely possible that the Hong Kong courts would follow the same approach if the new racial discrimination law includes the "requirement or condition" language in the definition of indirect discrimination.

We can return to the secondary school example to illustrate the potential problem with the "requirement or condition" language. Suppose that the school stated, in its job advertisement, that: "All candidates are required to have a university degree and extra points will be awarded during the selection process to applicants who hold degrees from British universities." If an applicant with a degree from a university in Hong Kong alleged that this was indirect discrimination the defendant would argue that the policy did not constitute a "requirement or condition" because it was not an absolute bar to a Hong Kong graduate. An applicant with a local degree could apply and would be considered, albeit at a disadvantage when compared to applicants with degrees from British Universities. If the Hong Kong courts followed the same approach as the English courts, this policy would probably be found to be outside the definition of indirect discrimination, although it clearly would have a discriminatory effect.

The UK has now dealt with this problem by amending its definition of indirect discrimination so to comply with the European Union Directive on equal treatment between persons, irrespective of racial or ethnic origins.²⁷ The Race Relations Act 1976 (Amendment) Regulations 2003 now sets forth a new definition of indirect discrimination on the grounds of race, ethnic and national origin.²⁸ Indirect discrimination occurs when a person A applies to another person B:

²⁶ See, for example, *Perera v Civil Service Commission and Department of Customs & Excise (No 2)* [1983] IRLR 166; and *Meer v London Borough of Tower Hamlets* [1988] IRLR 399.

²⁷ See European Union Council Directive 2000/43 EC of 29 Jun 2000, which addresses the principle of equal treatment between persons, irrespective of racial or ethnic origin, in the areas of employment, social protection, social advantage, education, and access to and supply of housing, goods and services.

²⁸ See Race Relations Act (n 19 above), at Regulations 3–4. The old definition of indirect discrimination still applies to claims of discrimination on the grounds of colour or nationality.

- a provision, criterion or practice which A applies to everyone; and
- the provision, criterion or practice puts (or would put) people from B's race or ethnic or national origin at a particular disadvantage; and
- the provision, criterion or practice puts B at a disadvantage; and
- A cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

This language is more flexible than the "requirement or condition" language proposed by the Hong Kong government and would also do a better job of complying with the requirements of ICERD. The words "provision, criterion, or practice" would include the type of discrimination described above in the secondary school example. It could also include informal practices that work to the disadvantage of particular racial or ethnic groups.

Another problem with the definition of indirect discrimination proposed by the Hong Kong government is that it would require the plaintiff to prove that a "considerably smaller proportion" of people from the plaintiff's racial group are able to comply with the "requirement or condition" compared with people not from that group. A plaintiff may not be able to produce statistical data demonstrating the difficulty that her group has in complying, especially if the policy that is being challenged is fairly new. While such statistical evidence is not essential, its absence can make it difficult to prove a differential impact. The definition adopted by the UK in the 2003 Regulations only requires evidence that the provision, criterion or practice "puts or would put people from a particular racial or ethnic group at a particular disadvantage." Thus it allows a plaintiff to challenge discriminatory policies or practices at an earlier stage.

Ideally the government should have explained these recent reforms to UK law in the *Consultation Paper*. Members of the public and the Legislative Council could then reach an informed opinion on whether the reforms should also be adopted in Hong Kong. The SDO and the DDO can always be amended, perhaps at the same time, to maintain consistency. It should be noted that the definition of indirect discrimination in the SDO and DDO had already been criticized in 1995, when these two laws were enacted. Several legislators attempted to persuade the government at that time to use a wider, more updated, definition. The government defeated those proposed amendments in 1995 by arguing that Hong Kong should stick with the definition used in the UK. Now that the UK has also rejected that old definition, the government's argument is much weaker. Hong Kong should adopt the best possible definition of indirect discrimination, one that will fully comply with its obligations under ICERD.

The Definitions of Racial Harassment and Vilification

The government has proposed to make racial harassment unlawful and to define it as:

“[U]nwelcome or unwanted conduct (which may include verbal abuse or hate mail) on account of the racial or ethnic background of the person harassed in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated by that conduct.”²⁹

This proposed definition is similar to s 2(6) of the DDO which defines disability harassment as:

“[U]nwelcome conduct (which may include an oral or written statement) on account of [the] second-mentioned person’s disability, or on account of the disability of an associate of [the] second-mentioned person, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the second-mentioned person would be offended, humiliated, or intimidated by that conduct.”

The one significant difference between the two definitions of harassment is that the DDO includes unwelcome conduct on account of the disability of a person’s associate, consistent with the fact that the DDO prohibits discrimination on the ground of the disability of a person’s associate. Earlier in this article, this author suggested that the new law should also prohibit discrimination on the ground of the race or ethnicity of a person’s associate. If that suggestion is followed then the definition of racial harassment should be similarly expanded. Similarly, the definition of vilification should be expanded to include vilification on the ground of the racial or ethnic background of a person’s associate. Moreover, the government has already stated that it intends to prohibit discrimination on the ground of the race or ethnicity of a person’s spouse or relative. Thus, regardless of whether the “associate” language that this author has suggested is added, the bill should prohibit harassment and vilification on the account of the racial or ethnic background of a person’s spouse or relative. This can be easily accomplished by inserting the words “or on account of the racial or ethnic background of the spouse or a relative” into the proposed definitions of racial harassment and vilification.

The value of having broad definitions of harassment and vilification has already been demonstrated in Hong Kong. Consider, for example, the

²⁹ See *Consultation Paper* (n 1 above), para 39, p 12.

incidents in which residents who were hostile to the establishment of neighbourhood health centres have harassed not only the clients of the centres but also family members who have accompanied clients to the centres and staff who work there.³⁰ Although these victims of harassment do not have a disability themselves, they can file complaints of harassment under the DDO. It is important that they be able to file complaints in their own names because their relatives (or patients or friends) who have disabilities may be reluctant to file complaints, due to privacy concerns. The same considerations may apply in cases of racial harassment or vilification.

The government's *Consultation Paper* mentions only one definition of racial harassment, whereas the SDO also provides an alternative definition which expressly prohibits "hostile work environment" harassment. While many forms of hostile environment harassment would probably fit within the government's proposed definition, it may wish to consider adding an express reference to hostile environment. The language used in s 2(5)(b) of the SDO could be modified to fit the racial discrimination bill. Alternatively, the government could refer to the UK's 2003 Regulations which define racial harassment as including unwanted conduct on the grounds of race or ethnic or national origins "which has the purpose or effect of (a) violating that other person's dignity; or (b) creating an intimidating, hostile, degrading, or offensive environment for him." Like the definition proposed by the Hong Kong government, the UK legislation also expressly incorporates the "reasonable person" standard by providing that conduct shall only be regarded as having the effect specified in (a) or (b) above if "having regard to all the circumstances, including in particular the perception of that other person, it should reasonably be considered as having that effect."³¹

Exemptions

The government has proposed a three-year exemption for small businesses, on the ground that a similar exemption was given when the other anti-discrimination laws were enacted.³² However, the argument for a temporary exemption was probably stronger then, as this was a new field of law for Hong Kong in 1995. Since small businesses have now been complying with three anti-discrimination laws for several years, they may not need a temporary exemption from this law. If one is required then it would be reasonable to shorten the temporary exemption to one year.

³⁰ For a report on incidents of this nature, see Equal Opportunities Commission, *Report on Case Study of Kowloon Bay Health Centre* (Hong Kong: 1999).

³¹ See Race Relations Act (n 19 above), Regulation 5.

³² See *Consultation Paper* (n 1 above), para 60, p 18.

The government has also proposed two very broad exemptions for itself. The first would provide that the legislation should not affect any immigration legislation governing the entry, stay in, or departure from Hong Kong of persons who do not have the right to enter and remain here. The second would exempt a discriminatory action by the government where "it is an act done for the purpose of complying with a requirement of an existing statutory provision."³³ In my view, these two proposed exemptions are overly broad and should be made more specific. There may be situations in which the government can justify differential treatment. However, government officials should be able to identify and explain those situations to the public and to the Bills Committee and then propose language that is narrowly tailored to the legitimate aims that have been identified.

Suggested Improvements to Hong Kong's Enforcement Model

The EOC was established in 1996 to enforce the SDO and the DDO and its jurisdiction was later expanded to include the FSDO. Although it is possible that the legislature will establish a separate body to enforce the new racial discrimination law, the more likely scenario is that this law will also be added to the EOC's terms of reference. This is, therefore, a good time to review the existing enforcement model and consider possible reforms. This section summarizes the findings of a recent study of the EOC's powers and approach in the context of gender and disability discrimination.³⁴

The EOC's primary enforcement mechanism is the power to investigate and conciliate complaints of discrimination and harassment. It rarely exercises its more coercive powers, such as the power to conduct formal investigations, the power to assist complainants who wish to litigate, or the power to litigate in its own name. Litigation without the EOC's assistance is also rare. Although complainants have the right to file complaints directly in the District Court the vast majority cannot afford legal representation. They therefore rely entirely upon the EOC, which has a statutory duty to attempt to conciliate complaints. Thus, a complainant is effectively obligated to attempt conciliation, as long as the respondent is willing to do so. Moreover, once a complainant enters the conciliation phase she will have a strong

³³ *Ibid.*, paras 57–58, p 17.

³⁴ For a more complete report on the study (including the data obtained from a random sample of 451 complaints, the statistical analysis, and interview results), see Carole J. Petersen, Janice Fong, and Gabrielle Rush, *Enforcing Equal Opportunities: Investigation and Conciliation of Discrimination Complaints in Hong Kong* (Hong Kong: Centre for Comparative and Public Law, 2003).

incentive to accept the remedy that is offered to her, even if it is rather meagre. She knows that if she rejects the offer, her complaint will be classified as “unsuccessfully conciliated” and the EOC will take no further action on her behalf unless she then applies for legal assistance. She will have also been advised that there is no guarantee that legal assistance will be granted. By this time she will have invested significant time and emotional energy in the complaint and will not want to walk away with nothing. In contrast, respondents are in a far more powerful position: they also know that the vast majority of complainants cannot afford to litigate on their own and that there is a good chance that EOC legal assistance will not be granted. Thus, the respondent can afford to offer a fairly small remedy. The complainant may very well accept it in order to avoid an unsuccessful conciliation. On the other hand, if she rejects the offer and legal assistance is later granted, the respondent can almost certainly still settle the complaint at a later stage by making a more reasonable offer.

In our recent study of the EOC’s complaints process we traced the progress of a random sample of all complaints filed under the SDO, DDO and FSDO and concluded by the EOC in a nine-month period. Of the 451 complaints in our sample:

- 204 (45%) were discontinued by the EOC;
- 158 (35%) were conciliated;
- 18 (4%) were resolved outside of the EOC’s complaints process; and
- 71 (16%) were classified as “unsuccessfully conciliated”.

Of the 71 complaints that were classified as unsuccessfully conciliated, the complainant applied for EOC legal assistance in 32 cases. Of those 32 applications, 15 were denied assistance and those complaints likely died at this stage. Legal assistance was therefore granted in only 17 of the original 451 complaints in our sample (less than 4 per cent of the total). Moreover, in five of these cases the EOC provided only preliminary legal advice and did not offer to represent the complainant in full litigation. In another nine cases the parties settled before legal action was taken and in one case the complainant withdrew. Thus, at the end of our study period, the EOC was preparing for court proceedings in only two cases of the original 451, which is less than one-half of one per cent of the total complaints in our sample.³⁵ Statistics collected by the government indicate that our sample is representative of the general pattern. According to the government, the EOC has commenced

³⁵ *Ibid.*, p 51.

court proceedings in less than one per cent of the 5,778 complaints it received from 1996 to 2003.³⁶

While some people may consider the lack of litigation a good thing, those who work in the equality field may feel otherwise. If respondents feel that there is no realistic threat of being sued they will have less incentive to offer meaningful remedies in conciliation. When we examined the remedies that were obtained in our sample of complaints we found that it was rare for the complainant to receive substantial monetary compensation. To some extent this is because complainants often seek non-monetary remedies, such as an apology, a positive reference letter, an improvement in access to a building, or the establishment of a policy prohibiting sexual harassment.³⁷ However, it is noteworthy that monetary compensation was requested in 75 complaints that proceeded to conciliation but only obtained in 35 complaints. In the other 40 complaints in which a financial remedy was requested the complaint either could not be conciliated or the complainant gave up her request for monetary compensation in order to reach an agreement. The amount of compensation also tended to be quite small, with the median award at only HK\$20,000.³⁸ Of course, in certain cases, the respondent may justifiably believe that the complaint is weak and that it does not warrant a substantial offer. However, even respondents facing strong cases sometimes can be painfully stubborn, as evidenced by the refusal of the government to settle the cases of *K, Y, and W v the Secretary for Justice*³⁹ and *EOC v Director of Education*.⁴⁰ It would not be surprising if respondents who do not expect to be sued were even less cooperative.

Litigation also plays an important role in public education and in judicial development of the legislation. Our interviews with disability rights groups indicate that they are particularly disappointed with the lack of litigation on accessibility issues.⁴¹ While a confidential settlement at the EOC may

³⁶ See *Consultation Paper* (n 1 above), para 14, p 5.

³⁷ See Petersen *et al* (n 34 above), Table 16, p 37.

³⁸ *Ibid.*, pp 39–40.

³⁹ *K, Y, and W v Secretary for Justice* [2000] 3 HKLRD 777. The judge noted that the government had declined to conciliate the cases or to voluntarily change the hiring policy, even after a government task force and the EOC had advised it that the policy violated the DDO.

⁴⁰ *EOC v Director of Education* [2001] 2 HKLRD 690. In this case the government originally indicated that it would reform the system in response to the EOC's formal investigation but then later changed its position and said that it would instead defend the system in court, where it lost conclusively.

⁴¹ See Petersen *et al* (n 34 above), Ch 6, for a more complete discussion of the interview results, which are only summarized here. It should be noted that while the sample of complaints was completely random, the interviewees could not be randomly selected as we depended upon contacts with the EOC and with NGOs to locate people who were willing to be interviewed. Thus, the views expressed in the interviews may not be representative of the general group of people who have used the EOC's services. However, the statements made in the interviews were quite consistent and likely represent the views of at least an important segment of people who have participated in the EOC complaints process.

provide one complainant with a wheelchair ramp in her building, a litigated case would hopefully encourage building owners throughout Hong Kong to make their buildings and public areas more accessible.

Our interviews also reveal that some complainants resent what they feel is an obligation to conciliate and to compromise on their principles. Some of our interviewees had genuinely hoped to obtain a hearing, a judgment, and vindication of their position. Some women who had filed complaints of sexual harassment also told us that it was demeaning to be asked to “negotiate” with the respondent and to specify an amount of money that would satisfy their claims. They felt that this was equivalent to telling the respondent that it was acceptable to sexually harass women as long as he paid for it later. They argued that a judgment would be more likely to prevent the respondent from repeating the harassment with other women and would also be the most effective way to encourage employers to adopt policies against sexual harassment. This is not to say that all complainants would prefer a public hearing of their complaints. Indeed, it is likely that the majority of complainants would like to avoid the publicity of a trial and the hostile cross-examination of the respondent’s attorneys. However, it does appear that a certain percentage would prefer to skip the conciliation phase and seek a hearing and a judgment. Some of the EOC officers whom we interviewed estimated that as many as 20 per cent of all complainants feel this way. Unfortunately, under the current model they cannot skip conciliation unless they can afford private legal representation.

One way to reform the system would be to relax the EOC’s statutory duty so that it is not obligated to attempt conciliation before granting legal assistance. Rather, if the complainant is not interested in a confidential settlement, the EOC could consider an application for legal assistance immediately. It is also very important that the EOC be given an adequate budget for litigation and that the government not take any retaliatory actions against the EOC when it litigates against government departments. The government’s failure to reappoint Anna Wu for a second three-year term was widely seen as an attempt to “rein in” the EOC and make it less likely to confront the government in future.⁴²

Another way to strengthen the enforcement model would be to establish an affordable and accessible equal opportunities tribunal. This would take some time, especially as there are many different models of tribunal to consider, but the EOC has apparently been studying the issue and will soon be in a position to make a recommendation to the government. In addition to providing a forum for those complainants who do not wish to conciliate their

⁴² See Petersen (n 18 above).

claims, a tribunal might also improve the bargaining position of the complainants who participate in conciliation. Respondents would have a greater incentive to offer substantial remedies and settle complaints if they know that the complainant can file a complaint in an affordable tribunal at any time, without first going through the "funnel" of applying for EOC legal assistance.

The other issue that needs to be addressed is the position of complainants during the investigation and conciliation phases at the EOC. Hong Kong adopted an enforcement model that emphasises conciliation because it was assumed to be faster, less expensive, and less stressful for the parties than litigation. It is also sometimes argued that conciliation is particularly appropriate for Hong Kong because of its predominantly Chinese community.⁴³ On the other hand, there is a risk that power imbalances will be perpetuated during conciliation, particularly if the conciliator adopts a strictly neutral position, which is the current approach of the Hong Kong EOC. The majority of respondents in our sample were not individuals but rather private sector companies, government departments, and public sector institutions. This means that the respondent can choose whom to appoint to represent it during the complaint and respondents commonly appoint managers, government officers, in-house lawyers, or other skilled employees. Thus the complainant often finds herself attempting to negotiate with someone with far greater socioeconomic power and far more experience with the law. If the complainant were litigating the case with EOC legal assistance she would have a lawyer by her side who would advocate her position. In contrast, in the conciliation phase, the complainant almost never has her own legal representation and the EOC lawyers are not involved. The EOC conciliation officer also does not advocate on behalf of the complainant. This often comes as a surprise to complainants, as they expect the EOC officer to actively advise and assist them during the process. Indeed, the most common complaint articulated in our interviews with past complainants and representatives of women's and disability groups was that the EOC officers are too "neutral" towards the complaint. The EOC officers whom we interviewed confirmed that complainants often look to them for assistance and are disappointed when the officers explain their duty of neutrality. The officers feel that they cannot give more assistance under the current model as respondents will accuse them of bias. The lack of an advocate is particularly significant because the processes of investigation and conciliation often turn out to be less consensual, and more adversarial, than complainants expect. Once notified of the complaint, the

⁴³ See, for example, Ng Sek-hong, "Employment and Human Rights in Hong Kong: Some Recent Developments" (1994) 24 HKLJ 108; and Bobby K.Y. Wong, "Traditional Chinese Philosophy and Dispute Resolution" (2000) 30 HKLJ 304.

respondent will often try to persuade the EOC that the complaint is without merit and should be discontinued. The respondent may also send the EOC lengthy letters with complex arguments. The complainant will then be asked to respond to the respondent's letters. This is an extremely stressful process for many complainants and they often feel inadequate and overwhelmed.

The EOC has attempted to reduce the stress of investigation by introducing the option of early conciliation. This means that the parties are encouraged to attempt conciliation even before an investigation is conducted. Our study shows that early conciliation does have a higher rate of success than post-investigation conciliation but there may be certain disadvantages. The complainant will not have as much information from the respondent when she enters the conciliation and may have a harder time anticipating the arguments that the respondent will make. In any event, regardless of whether the parties pass through early conciliation, post-investigation conciliation (or both), the complainant will probably find the conciliation phase intimidating, particularly if the parties participate in a face-to-face conciliation conference. Our interviewees frequently described the fear that they experienced when asked to negotiate with their former supervisor or other "official" representing the respondent during the EOC process. Complainants do often bring along a friend or a representative of an NGO but this person typically is only allowed into the conference if the respondent agrees. These findings argue in favour of giving the EOC more authority to actively assist complainants, particularly when the complaint has been filed against a company or other institutional respondent and when a clear imbalance of power exists. Commissions in other jurisdictions, such as Australia, have recognised that a more interventionist approach by the conciliator is sometimes necessary to assist the parties to participate in conciliation on equal terms. In order to ensure a fair and just process, the EOC officer must be empowered to "move beyond notions of formal equality as clearly treating unequals equally will exacerbate rather than ameliorate party disadvantage."⁴⁴

The need for a more proactive approach to conciliation will likely be even greater once a race discrimination bill is enacted, in part because the complainants and the NGOs that assist them will be unfamiliar with the law and also because the EOC will probably be working with an increased percentage

⁴⁴ See Tracey Raymond and Jodie Ball, *Alternative Dispute Resolution in the Context of Antidiscrimination and Human Rights Law: Some Comparisons and Considerations*, available on the website of the Australian Human Rights and Equal Opportunities Commission at <http://www.hreoc.gov.au>. For further discussion of the approaches that can be taken by conciliators, see Katherine Lynch, "Private Conciliation of Discrimination Disputes: Confidentiality, Informalism and Power", paper presented at *Enforcing Equal Opportunities in Hong Kong: An Evaluation of Conciliation and Other Enforcement Powers of the EOC*, 14 Jun 2003, Centre for Comparative and Public Law, University of Hong Kong, available at the CCPL website at <http://www.hku.hk/ccpl>.

of clients who do not speak either Cantonese or English fluently. The EOC will need to be given adequate resources, full independence, and a clear mandate. Finally, the government must make its process of appointing members to the EOC more transparent and ensure that it includes representation from ethnic minorities. This should have been done long ago, since members of ethnic minorities can currently file complaints under the SDO, DDO, and FSDO. Minority representation will be even more important if the EOC takes on the additional responsibility of enforcing a racial discrimination ordinance.

Members of Hong Kong's ethnic and immigrant communities will, no doubt, have additional suggestions for the legislation and the enforcement model. They will hopefully participate actively in this consultation exercise. The government's proposals are to be welcomed and, with some fine-tuning, can be turned into a comprehensive law that fully complies with ICERD and suits the circumstances of Hong Kong.